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In the Supreme Court of the United States

OCTOBER TERM, 1922.

UNITED STATES OF AMERICA, PLAINTIFF in error,
v.
RAYMOND H. BOWMAN. } No. 69.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The United States, by this writ of error, seeks to review a judgment of the District Court for the Southern District of New York sustaining a demurrer to an indictment found in that court.

The specific question to be reviewed is whether the District Court had jurisdiction of the offenses denounced by section 35 of the United States Criminal Code, if committed by citizens of this country on board an American vessel upon the high seas.

The defendant in error, together with three other persons, Wry, Hankinson, and Millar, were on October 5, 1920, indicted for conspiracy to defraud the United States Shipping Board Emergency Fleet Corporation, a corporation in which the United States was a stockholder, under section 35 of the Criminal Code.

The defendant Hankinson pleaded guilty (p. 22). The defendant Wry forfeited his bail (p. 22). The defendant Millar was never arrested, and the defendant in error, Bowman, demurred to the indictment. The demurrer was sustained.

The purpose of the conspiracy was to cause the Emergency Fleet Corporation to pay for 1,000 tons of fuel oil for account of the steamship *Dio*, a vessel belonging to that corporation, while but 600 tons of the oil were to be delivered to the vessel, the difference between the price paid for the 1,000 tons and the 600 tons actually delivered, to be divided between the conspirators; that is, the Fleet Corporation was to pay for 400 tons of oil which it had never received and the defendants were to receive the amount paid therefor.

FACTS.

The facts in more detail as they are alleged in the indictment show that the National Shipping Corporation was operating and managing on behalf of the Fleet Corporation the vessel *Dio*, owned by the Fleet Corporation, under a contract whereby the expenses for oil, labor, and material for repairs and replacements for the vessel were to be paid by the Fleet Corporation. E. Johnston & Company (Ltd.) were the agents for the National Shipping Corporation at Rio de Janeiro, Brazil. The Standard Oil Company of Brazil was a dealer in oil at Rio de Janeiro. Wry was a citizen of the United States and master of the vessel. Bowman was a citizen of the United States and chief engineer of the vessel. Hankinson was a

citizen of the United States and a representative of the Standard Oil Company of Brazil at Rio de Janeiro, and Millar was a British subject and a merchant, ship repairer, and engineer of the city of Rio de Janeiro (p. 2).

The conspiracy began on board the *Dio* upon the high seas, "out of the jurisdiction of any particular State and out of the jurisdiction of any district of the United States, but within the admiralty and maritime jurisdiction of the United States." As part of the conspiracy, Wry and Bowman were by wireless telegraph to notify Johnston and Company that they would require at Rio de Janeiro, for use of the vessel, 1,000 tons of fuel oil; that an order for account of the Fleet Corporation for 1,000 tons of oil should be given to the Standard Oil Company of Brazil; that the defendant Hankinson should accept said order on behalf of the Standard Oil Company and should charge the vessel therefor, but should deliver on account of the order only 600 tons of oil; that an invoice in the name of the Standard Oil Company for 1,000 tons of oil, and a receipt signed by Wry and Bowman, the master and engineer of the vessel, therefor, should be presented to Johnston and Company; that Wry and Bowman should approve payment of the invoice and thereby procure Johnston and Company, for account of the Fleet Corporation, to pay the amount of the invoice in the form of a check on a local bank at Rio de Janeiro, made payable to bearer; that the defendant Millar should cause the check to be cashed; that the defendants

should cause to be paid to the Standard Oil Company an amount equal to the price of 600 tons and should divide among themselves the remaining proceeds of the check; and that false reports to the agents of the National Shipping Corporation should be made by Wry and Bowman showing the receipt of 1,000 tons of oil, and thus the fraud should be concealed and covered up (p. 3). Overt acts showing the successful outcome of the conspiracy are also set forth.

THE INDICTMENT.

The indictment is in six counts. The substance of the offense charged in the first, second, and third counts is a conspiracy to defraud the Fleet Corporation. The fourth count describes the offense as making and causing to be made for payment a false, fictitious, and fraudulent claim against the Fleet Corporation. The fifth count charges the presentation of the same claim. The sixth charges the concealment by trick, scheme, and device of a material fact in the presentation of the claim.

The *locus* of the acts relied upon as constituting the crime is variously described in the several counts. In the first count it is alleged that the conspiracy occurred on the high seas on board the *Dio;* the second alleges the same conspiracy upon the high seas and elsewhere out of the jurisdiction of any particular State or of any district of the United States but within the admiralty and maritime jurisdiction of the United States, to wit: On board the *Dio* on the high seas and at the port of Rio de Janeiro, as

well as in that city. The third alleges that the offense took place at Rio de Janeiro; the fourth alleges that the offense occurred on board the *Dio* at the port of Rio de Janeiro; and the fifth alleges that the presentation of the false claim was at the city of Rio de Janeiro; the sixth alleges that the misconduct was at the port and city of Rio de Janeiro. Inasmuch as it is not claimed that the indictment is defective in any of its substantive allegations, it is unnecessary to discuss it in detail.

THE DEMURRER.

Bowman demurred to each count of the indictment on the ground that it appears on the face thereof that the court has no jurisdiction of the subject matter of the action (p. 15):

> First. That it is not alleged, nor does it appear in the said indictment nor in any count thereof, that any act or crime alleged in said indictment nor in any count thereof was committed within the jurisdiction of the United States nor within the jurisdiction of any particular State thereof.
>
> Second. That it does appear by the said indictment and by each and every count thereof that the acts and crimes alleged in said indictment and in each and every count thereof were committed without the jurisdiction of the United States and every State thereof; that is to say, that the said acts and alleged crimes set forth in the said indictment and each and every count thereof were committed within the jurisdiction of the Republic of Brazil.

THE DECISION OF THE COURT BELOW.

Judge Mayer gave the case very careful consideration and, in sustaining the demurrer, reached his conclusion with evident reluctance.

He held that so far as the substantive matter in the indictment was concerned, each count set forth a complete offense under section 35 of the Criminal Code (p. 19); that if any Federal court has jurisdiction, the Southern District of New York was the correct forum (p. 19); that Congress has power to enact legislation such as that embodied in section 35 of the Criminal Code, applicable upon the high seas (p. 20). He points out that one of the accepted functions of the sovereign is to regulate the ships under its flag on the high seas and the conduct of its citizens while on those ships, and that such authority has been exercised and repeatedly sustained by the courts (citing authorities), and that the power may be based on any one of several express provisions of the Constitution, including the power to regulate foreign commerce, the power to define felonies on the high seas, and the power to make effective the other powers of government, by providing laws for the protection of the Government, its agencies, or property.

He says (p. 20):

> Ordinarily, however, and *prima facie*, the criminal laws of the United States are effective only within the territory of the United States. For that purpose, however, the high seas

> outside a marine league from the shores and outside the jurisdiction of any particular State, are constructively a part of such territory. Indeed, the high seas are a part peculiarly within the jurisdiction of the United States, in the application of its criminal laws, as distinguished from the States and their laws. (Citing authorities.)

He concludes, however, that when Congress has intended that its laws shall be operative on the high seas it has so stated; that chapters 11 and 12 of the Criminal Code refer to the high seas, while chapter 4, in which is included section 35, does not, and from this the learned Judge draws the inference that jurisdiction of the crimes alleged has not been conferred upon the court, and that in the absence of language extending the *locus* of the crime to the high seas or beyond the territory of the United States, "the court and not Congress would be writing the statute, if it gave to it the construction urged by the Government."

THE CONTENTION OF THE GOVERNMENT.

It is with this conclusion of the court below that the Government takes issue, and we contend:

> First. The criminal jurisdiction of the United States may extend to offenses against its laws committed by American citizens upon the high seas.
>
> Second. Section 35 of the Criminal Code is broad enough in its language to cover and it was intended to cover the offenses enumerated when committed anywhere within the criminal jurisdiction of the United States.

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Third. The legislation of Congress with respect to this class of crimes does not warrant the inference that it intended to limit the application of the statute under consideration to any particular locality within the criminal jurisdiction of the United States.

Fourth. The jurisdiction of the court below is complete and adequate to try the defendant upon the indictment.

THE STATUTES INVOLVED.

CRIMINAL CODE.

CHAPTER 4. OFFENSES AGAINST THE OPERATION OF THE GOVERNMENT.

* * * * *

SEC. 35. Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, *or any corporation in which the United States of America is a stockholder*, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, *or any*

corporation in which the United States of America is a stockholder, shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry; or whoever shall take and carry away or take for his own use, or for the use of another, with intent to steal or purloin, any personal property of the United States, or any branch or department thereof, *or any corporation in which the United States of America is a stockholder;* or whoever shall enter into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, *or any corporation in which the United States of America is a stockholder*, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim; and whoever, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, with intent to defraud the United States, or any department thereof, *or any corporation in which the United States of America is a stockholder*, or willfully to conceal such money or other property, shall deliver or cause to be delivered to any person having authority to receive the same any

amount of such money or other property less than that for which he received a certificate or took a receipt; or whoever, being authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, shall make or deliver the same to any other person without a full knowledge of the truth of the facts stated therein and with intent to defraud the United States, or any department thereof, *or any corporation in which the United States of America is a stockholder*, shall be fined not more than $10,000 or imprisoned not more than ten years, or both. And whoever shall purchase, or receive in pledge, from any person any arms, equipment, ammunition, clothing, military stores, or other property furnished by the United States, under a clothing allowance or otherwise, to any soldier, sailor, officer, cadet, or midshipman in the military or naval service of the United States or of the National Guard or Naval Militia, or to any person accompanying, serving, or retained with the land or naval forces and subject to military or naval law, having knowledge or reason to believe that the property has been taken from the possession of the United States or furnished by the United States under such allowance, shall be fined not more than $500 or imprisoned not more than two years, or both. (Italics ours.)

JUDICIAL CODE.

CHAPTER 2. DISTRICT COURTS—JURISDICTION.

SEC. 24. The District Courts shall have original jurisdiction as follows:

* * * * *

Second. Of all crimes and offenses cognizable under the authority of the United States.

CHAPTER 4. MISCELLANEOUS PROVISIONS.

* * * * *

SEC. 41. The trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought.

ARGUMENT.

I.

The criminal jurisdiction of the United States may extend to offenses against its laws committed by American citizens upon American ships on the high seas.

This general principle was recognized by the court below and is too well established to require argument. It may be well, however, to recall the familiar words of Mr. Justice Field in *United States* v. *Smiley*, 6 Sawyer, 640 Fed. Case. No. 16317, who stated the principle as follows:

> The criminal jurisdiction of the Government of the United States—that is, its jurisdiction

to try parties for offenses committed against its laws—may in some instances extend to its citizens everywhere. Thus, it may punish for violation of treaty stipulations by its citizens abroad, for offenses committed in foreign countries where, by treaty, jurisdiction is conceded for that purpose, as in some cases in China and in the Barbary States; it may provide for offenses committed on deserted islands, and on an uninhabited coast by the officers and seamen of vessels sailing under its flag. It may also punish derelictions of duty by its ministers and consuls, and other representatives abroad. But in all such cases it will be found that the law of Congress indicates clearly the exterritorial character of the act of which punishment is aimed. Except in cases like these, the criminal jurisdiction of the United States is necessarily limited to their own territory, actual or constructive. Their actual territory is coextensive with their possessions, including a marine league from their shores into the sea. * * * *The constructive territory of the United States embraces vessels sailing under their flag; wherever they go they carry the laws of their country, and for a violation of them their officers and men may be subjected to punishment.* (Italics ours.)

II.

Section 35 of the Criminal Code is broad enough in its language to cover and it was intended to cover the offenses enumerated when committed anywhere within the criminal jurisdiction of the United States.

This section has been set forth at length (*ante* p. 8). The person who is guilty is "whoever" shall do any of the acts mentioned. The offense is defrauding the Government, and the propensity to commit it is, unhappily, general and not local. No place is mentioned where the commission of the acts becomes criminal, and no place is indicated where they may be committed and not be criminal. The intent is to protect the Public Treasury from plunder, not to punish wrongs against persons or property in any particular place, or disturbances of the peace or security of any particular community. The Public Treasury is located at the seat of government, and this statute by its terms would seem to condemn "whoever," regarding it with covetous eye, stretches forth a grasping hand, no matter how far away he may be, provided he is within the criminal jurisdiction of the United States. If the decision of the court below is right, the power to punish under this act stops at the shore, not because the United States is without power but because Congress, by the language of this act, has failed to exercise the power. Is it conceivable that Congress intended that the Treasury could be defrauded by its own citizens if they perpetrated the fraud on the high seas?

The section under consideration is contained in chapter four of the Criminal Code entitled "Offenses against the operations of the Government." These offenses are many in number and include forging bonds and letters patent, pretending to be a United States officer, bribery of United States officers, enticing desertion from the Army or Navy, embezzling or stealing money or property of the United States, forging customs entry certificates, destroying or concealing invoices, securing false entry of goods, forging or altering ships or customhouse papers, forging certificates of citizenship. In each instance the guilty one is "whoever" does the criminal act. If the decision of the court below is correct, then all these offenses against the operations of the Government are not crimes when committed by American citizens upon American ships. If so, a fatal vacuum exists in our criminal jurisprudence and the law, like nature, abhors such a vacuum.

The language of the act is surely broad enough considered by itself, but the court says that when Congress "has intended that its laws shall be operative on the high seas, it has so stated" (p. 20). The conclusion is not drawn from any language contained in the act, therefore, but from omissions which the court deems significant because of language used in other acts.

III.

The legislation of Congress with respect to this class of crimes does not warrant the inference that it intended to limit the application of the statute under consideration to any particular locality within the criminal jurisdiction of the United States.

When the history of the criminal legislation of the United States is examined carefully, no such significance appears. In legislating with respect to crimes, Congress has recognized these divisions into which criminal acts may be divided:

First. Crimes which may be called ordinary crimes; that is, crimes against individuals or their property and well known to the common law, or such as were universally recognized as crimes by all civilized nations, and the punishment of which was peculiarly within the jurisdiction of local sovereignties. Murder, burglary, larceny, robbery, and arson are familiar examples.

Second. Crimes which are by their nature offenses not against individuals or their property but against the sovereignty of the United States as distinct from that of a State, and of which the States have no jurisdiction. Counterfeiting, bribery of United States officers, offenses against the revenue laws, against the national banking law, and against public justice are illustrations of this class.

Third. Crimes which may be called crimes of the sea; for instance, piracy and the scuttling of a vessel. With respect to the first class of crimes it has been

the policy of the United States, irrespective of any question of jurisdiction, to leave their punishment to the States.

In *Caha* v. *United States*, 152 U. S. 211, Mr. Justice Brewer, writing for the court, said (p. 215):

> Generally speaking, within any State of this Union the preservation of the peace and protection of person and property are the functions of the State government, and are no part of the primary duty, at least, of the Nation. The laws of Congress in respect to those matters do not extend into the territorial limits of the States, but have force only in the District of Columbia and other places that are within the exclusive jurisdiction of the National Government.

With respect to crimes of this character Congress has enacted legislation making them punishable when committed within the jurisdiction of the United States but without the jurisdiction of any State. This has been done in order that offenders might not escape merely because there was no power to punish them. So criminal acts of this character have been made punishable by the United States when committed within forts, military reservations, and other places within the territorial limits of a State but without the jurisdiction of the State and upon the high seas.

With respect to the third class of crimes—that is, sea crimes—only the United States has jurisdiction and it has enacted legislation for their punishment.

With respect to the second class of crimes, however, the great mass of statutory offenses not against persons and property *but against the sovereignty of the United States and the operations of its Government*, and which do not depend for their criminal character upon the locality in which they are committed, Congress has not adopted any policy of distinguishing between crimes on land and crimes at sea. The offenses condemned by section 35 of the Criminal Code are of this character.

From the beginning of the Government, however, Congress has recognized the fact that the criminal jurisdiction of the United States extends not only throughout its territorial limits but also to the high seas. In the judiciary act of September 24, 1789 (1 Stat. 73), Congress established the district and circuit courts and gave them jurisdiction of all crimes and offenses "cognizable under the authority of the United States, committed within their respective districts, or upon the high seas." At the time this act was passed Congress had not made any acts crimes against the United States.

At the second session of the First Congress on April 30, 1790 (1 Stat. 112), it passed an act entitled "An act for the punishment of certain crimes against the United States" and in this act the distinction between the classes of crimes hereinbefore mentioned was clearly drawn. This act provided for the punishment of treason and various crimes, most of which were common-law crimes. It provided for the punishment of murder and manslaughter "within any fort, arsenal, dock yard, magazine, or in any other

place or district of country, under the sole and exclusive jurisdiction of the United States"; murder or robbery, "or any other offense which if committed within the body of a county, would by the laws of the United States be punishable with death" when committed upon "the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular State." The act then proceeded to define and provide for the punishment of piracy upon the high seas. It defined and provided for the punishment of mayhem within any of the places upon the land under the exclusive jurisdiction of the United States or upon the high seas on any vessel belonging to the United States or to any citizen thereof. These provisions of the statute, with the exception of those relating to treason, enumerate offenses against persons and property which by the common law of that day would be crimes if committed within the jurisdiction of a State, or they were essentially crimes of the sea.

The act then provides punishment for crimes of the second class mentioned above which by their nature were crimes against the United States and the operations of its government, and of which the United States had jurisdiction without reference to the place where they were committed. They are, forging or counterfeiting any public security of the United States; stealing or falsifying any record, writ, process, or other proceedings in any of the courts of the United States, etc. In describing these offenses no words are used limiting them to any locality. The

language is "if any person or persons." Section 16 relates to the crime of larceny and its application is limited to places under the sole and exclusive jurisdiction of the United States or upon the high seas, another common law crime, it is to be noticed, which in all other places would be punishable by the local authority. This same section also provides for the punishment of the offense of stealing arms, munitions, habiliments of war, etc., belonging to the United States. The next section, 17, punishes the offense of receiving stolen goods by any person "within any part of the jurisdiction of the United States, as aforesaid." The next section, 18, provides for the punishment of perjury in any suit depending in any of the courts of the United States, or in any deposition taken pursuant to the laws of the United States. Section 21 provides for the punishment of bribery of a judge of the United States. Section 22 makes it a crime to obstruct an officer of the United States in serving any process of a United States court. Without going into the matter at too great length, we think that we are warranted in saying that there is nothing in this first criminal statute of the United States to show that Congress, when it used general words without limitation, intended to restrict the crimes therein mentioned to any particular place or places. Where the crime was one against the operations of the Government, no words of limitation were used. Wherever the high seas were mentioned, it was because the crime, from its nature, was one which could only be committed at sea, or else it was one

which was by its nature a crime punishable by the laws of the States if committed on land, but, by reason of the fact that it was committed at sea, was beyond their jurisdiction.

This same distinction has been carried through the various revisions and compilations of the statutes which have been made since. While an exhaustive examination of them all might and probably would show certain exceptions or seeming exceptions, we feel certain that there is no warrant for the inference that Congress in any general way has ever adopted the policy, in respect to crimes which were by their nature crimes against the sovereignty of the United States and the operations of its Government, and which did not depend upon their locality for their criminal character, of drawing a distinction between those which were punishable if committed on land and those which were punishable if committed at sea.

The same general classification of crimes was carried into the Revised Statutes and continued in the Criminal Code. The Criminal Code was enacted by the act of March 4, 1909, 35 Stat. 1088. It consists of fifteen chapters. The first ten relate to offenses against the existence of the Government, against neutrality, against the elective franchise and civil rights, against the operations of the Government (chap. 4, which includes section 35) relating to official duties, against public justice, against the currency, against the Postal Service, against foreign and interstate commerce, and peonage and the

slave trade. Chapter 12 is entitled "Piracy and other offenses upon the seas." These offenses, essentially sea crimes, are piracy, maltreatment of crew by officers of a vessel, inciting mutiny on shipboard, revolt or mutiny on board ship, a seaman laying violent hands upon his commander, abandonment of a mariner in foreign port, conspiracy to cast away a vessel, plundering a vessel in distress, attacking a vessel with intent to plunder, breaking and entering a vessel, destroying vessel at sea, destroying or attempting to destroy a vessel, robbery on shore by piratical crew, arming vessel to cruise against citizens, piracy under color of foreign commission, piracy by aliens, running away with vessel or cargo, confederating with pirates, selling arms, intoxicants, etc., in the Pacific Islands.

Chapter 11 is entitled "Offenses within the admiralty and maritime and territorial jurisdiction of the United States." The first section of this chapter defines the places and waters to which it is applicable, sec. 272. These places are:

(1) The high seas or any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, or, within like limitations, on board any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created under the laws of the United States or any State, district, or Territory.

(2) When committed upon any vessel registered under the laws of the United States and on a voyage

upon the waters of any of the Great Lakes or any of the waters connecting said lakes or upon the river St. Lawrence, where it is the international boundary line.

(3) When committed on any lands acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or acquired by the United States by consent of the legislature of the State for the erection of a fort, etc.

(4) On any island appertaining to the United States containing deposits of guano.

The offenses set forth in this chapter are, without exception, offenses of a common-law nature, crimes against persons and property, and such as are universally punishable by the laws of the different States, like murder, manslaughter, felonious assault, robbery, arson, and other crimes of violence, larceny, and receiving stolen goods. The last section of the chapter, section 289, provides that whoever within the territorial limits of any State, organized territory, or district, but within any of the places described in section 272, shall do anything not made penal by any law of Congress but which, if committed within the jurisdiction of the State, Territory, or District in which such place is situated, would by its laws be penal shall be deemed guilty of a like offense.

The intention of this chapter was to provide a criminal code for those places *under the exclusive jurisdiction of the United States*, so that they should not be freed from the restraints of law. *Western Union Tel. Co.* v. *Chiles*, 214 U. S. 274, 278, 279.

An examination of chapters 11 and 12 of the Criminal Code, therefore, shows that the reasoning adopted by the court below was unsound. It *does* show that when "Congress has intended that its laws shall be operative on the high seas it has so stated," in *two classes of cases* only. (1) Crimes which are by their nature committed only upon the seas and (2) offenses universally recognized as atrocious crimes, punishable by the laws of every State, and which if not specifically made crimes by act of Congress would go unpunished.

But what of the great body of statutory crimes created by Congress in which the element of locality plays no part and over which no State has jurisdiction; offenses against the existence of the Government itself, against the elective franchise, against the operations of government, against public justice, against the coinage, the Postal Service, and all the other crimes set forth in the first ten chapters of the Criminal Code? Can it be inferred that the things made penal by them can with impunity be committed on the high seas, merely because in chapter 11 Congress has specifically provided for the punishment of offenses within the admiralty and maritime and territorial jurisdiction, and in chapter 12 for piracy and other offenses upon the seas? Defrauding the Government is not an admiralty, maritime, or territorial offense. Are the high seas safe for those who would counterfeit the coin or forge the securities of the United States, bribe its officials, and conspire to plunder its Treasury, merely because Congress has by

appropriate language provided for the punishment of piracy, and murder in a fort or on the guano islands? The crime of treason is defined as follows in section 1:

> Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason.

But sections 3 and 4, defining misprison of treason and inciting rebellion or insurrection, do not contain the words "within the United States or elsewhere." They use merely the word "whoever."

Are American ships on the high seas, therefore, sanctuaries for those who would incite insurrection or rebellion?

Finally, Congress has in so many words forbidden any such presumption as that drawn by the court below. Section 339 of the Criminal Code provides:

> The arrangement and classification of the several sections of this title have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the chapters under which any particular section is placed.

The history of section 35 is suggestive. It is based upon section 5438, Revised Statutes, which in turn was derived from the act of March 2, 1863, ch. 67, 12 Stat. 696. This act was entitled "An act to prevent

and punish frauds upon the Government of the United States." The first section made criminal fraudulent acts against the Government committed by "any person in the land or naval forces of the United States or in the militia in actual service of the United States, in time of war," to be punished by court-martial. Section 3 provided that any person *not* in the military or naval forces nor in the militia who should commit any of the acts prohibited should forfeit the sum of two thousands dollars and, in addition, double the amount of damages sustained by the United States, to be recovered by suit, and should be subject also on conviction "in any court of competent jurisdiction." to fine or imprisonment. Section 4 provided that the District Courts of the United States, the Circuit Court of the District of Columbia, and the District Courts of the Territories within whose jurisdictional limits the offender should be found, "wheresoever such act may have been done or committed" should have jurisdiction to "hear, try, and determine such suit." A fair reading of this section indicates, perhaps, that it had reference only to the civil suits, but it shows clearly that the condemnation of the fraudulent acts was universal, not limited as to locality. Through the subsequent amendments and compilations, the statute has been condensed, but there is nothing to indicate that it has been limited in its application or that the word "whoever" means less than what was comprehended by the words "any person *in* the land or naval forces of the United States, or *in* the militia in actual service of

the United States, in time of war, and 'any person' *not* in such forces or service, 'wheresoever such act may have been done or committed.'"

The particular offense charged against the defendant arose under the amendment to section 35 made by the act of 1918, which extended the application of the act to frauds against a corporation in which the United States was a stockholder. This act was passed in the midst of the war, undoubtedly with special reference to the Emergency Fleet Corporation. The amending act, according to the report of the House Committee on the Judiciary, was for the protection, among other things, of the ammunition and stores of the Army and Navy in all its branches and divisions. At that time the operations of the Fleet Corporation and of the Army and Navy were, in large part, conducted upon the seas, and we can not believe that Congress intended to make frauds upon the Fleet Corporation or the receiving of arms, ammunition, equipment, and military stores stolen from the United States, crimes only if committed upon land and not crimes if committed on ships upon the seas.

The committee said in reporting the bill with amendments (H. R. No. 668, 65th Cong., 2nd sess.) that the object was—

> to fully reenact and reenforce the provision of section 35 of the Criminal Code so that it will include * * * an offense against any corporation in which the United States of America is a stockholder * * * and includes the

> protection of the uniform and all arms, ammunition, and stores of the Army and Navy of the United States in all its branches and divisions.

The perils of 1863, when the Nation was at war, again threatened. Why should it be thought that Congress had in mind only frauds conceived on land and not those "wheresoever" committed?

In the case of *Caha* v. *United States*, 152 U. S. 211, the plaintiff in error had been convicted of the crime of perjury in the District Court of the United States for the District of Kansas for false testimony given in a contest over a homestead entry in the land office. The crime was committed on January 3, 1890, before the passage of the act creating the Territory of Oklahoma, in the land office at Kingfisher, Oklahoma. The indictment was demurred to upon the grounds (1) that the court had no jurisdiction over the offense and (2) that the indictment stated no public offense. It was not disputed that at the time of the commission of the offense the district court of Kansas had general jurisdiction over offenses against criminal laws of the United States at the place where the perjury was committed. The defendant was indicted under section 5392 of the Revised Statutes, which provided as follows:

> Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration,

> deposition, or certificate by him subscribed is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury.

Apparently, although it is not wholly clear from the report of the case, the defendant claimed that that section was not applicable because of the provision of section 2145, which provided as follows:

> Except as to crimes the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

The latter section was included in Title XXVIII entitled "Indians," while section 5392 was included in Title LXX entitled "Crimes, chapter 4, entitled 'Crimes against justice.'" The argument seems to have been something like that advanced in the case at bar; that section 5392, a general statute against the crime of perjury, did not apply to perjury committed in the Indian Territory, because by section 2145 Congress had made applicable to the Indian country *only the general laws of the United States relating to the punishment of crimes committed in places within the sole and exclusive jurisdiction of the United States* (except as to the crimes, the punishment of which was expressly provided for in Title XXVIII, relating to Indians). In overruling this condition Mr. Justice

Brewer, writing for the court, said of section 5392 (p. 215):

> This statute is one of universal application within the territorial limits of the United States, and is not limited to those portions which are within the exclusive jurisdiction of the National Government, such as the District of Columbia. Generally speaking, within any State of this Union the preservation of the peace and the protection of person and property are the functions of the State government, and are no part of the primary duty, at least, of the Nation. The laws of Congress in respect to those matters do not extend into the territorial limits of the States, but have force only in the District of Columbia, and other places that are within the exclusive jurisdiction of the National Government. It was in reference to such body of laws that section 2145, Revised Statutes, was enacted, and the argument which is sought to be drawn by the counsel therefrom against the jurisdiction of the district court of Kansas has no foundation. It is enough that section 5392 has uniform application throughout the territorial limits of the United States; that by section 563 the District Courts are given jurisdiction generally "of all crimes and offenses cognizable under the authority of the United States committed within their respective districts;" and that by 22 Stat. at L. 400, chap. 13, §2, the territory in question was annexed to and made a part of the United States judicial district of Kansas.

In saying that section 5392 had "uniform application throughout the territorial limits of the United States," it is apparent that the court did not have in mind any distinction between the land and the sea. The fair inference is that the words were used in the sense of universal and general as distinguished from local and special. The fact that Congress had made certain laws specifically applicable to the territory in question, did not mean that the body of general and universal law did not apply. "Territorial limits," it is fair to assume, was intended to have the same meaning as the words "territory, actual or constructive," used by Mr. Justice Field in *U. S.* v. *Smiley, supra.*

This case is not one for the application of the well-known rule that criminal statutes are to be construed strictly.

The reason for the rule of strict construction of penal statutes is that no man should be called on to answer for a crime unless the acts made criminal are distinctly set forth in the statute. The citizen should be able, from reading the statute, to regulate his conduct, and to determine whether any contemplated course of conduct is or is not a violation thereof. There is some excuse for extending the benefit of a doubt to one who has done things not strictly within the meaning of a statute defining a criminal act. *There is no reason for extending the benefit of the doubt to one who has committed clearly and distinctly the prohibited act but may on the theory of the court below have chosen a safe place to do it.* In

the former case the rule protects the innocent; in the latter, it merely protects the guilty. But here we have no claim that the statute is uncertain or ambiguous. It is not a question of statutory construction. "Where there is no ambiguity, in the words there is no room for construction." (*U. S.* v. *Wiltberger*, 5 Wheat. 76, quoted in *U. S.* v. *Harris*, 177 U. S. 310.) The question rather is whether there is anything in the settled policy of Congress, as shown by a consideration of its acts, which justifies the court in holding that Congress has intended to limit the application of the act in a manner not indicated by the language used. That question, we contend, and we believe correctly, should be answered in the negative.

In *United States* v. *Lacher*, 134 U. S. 624, 629, Chief Justice Fuller, in delivering the opinion of the court, said, quoting from Sedgwick on statutory and constitutional law.

> "The rule that statutes of this class are to be construed strictly is far from being a rigid or unbending one; or rather, it has in modern times been so modified and explained away as to mean little more than that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment; the courts refusing, on the one hand, to extend the punishment to cases which are not clearly embraced in them, and, on the other, equally refusing, by any mere verbal nicety, forced construction or equitable interpretation, to exonerate parties plainly within their scope."

This passage is quoted by *Baron* Bramwell, in *Atty. Gen.* v. *Sillem*, 2 Hurl. & C. 532, as one "in which good sense, force, and propriety of language are equally conspicuous; and which is amply borne out by the authorities, English and American, which he cites."

IV.

The jurisdiction of the court below is complete and adequate to try the defendant upon the indictment.

Sections 24 and 41 of the Judicial Code set forth at page 11, *supra*, confer complete jurisdiction upon the district court in which the indictment was found.

CONCLUSION.

The offense for which the defendant was indicted therefore, being clearly within the criminal jurisdiction of the United States; the crime itself being one against the operations of its government, in no way deriving its criminal character from the locality where it was committed, but equally harmful wherever done; the language of the act being comprehensive and clear and without implied limitation; and the courts of the United States being clothed with adequate jurisdiction, the defendant should be tried for the crime.

The court below draws an inference from the fact that while the substance of section 35 has been upon the statute books for many years, it does not appear that there has heretofore been any case in which that section has been invoked to punish the offenses

denounced when committed on the high seas. So far as we can find, this is true, but always there must be a first offense under any statute, and we would like to believe that heretofore the men who go down to the sea in ships have not been moved, while yet upon the great waters, to defraud their country under whose flag they sailed.

It is therefore respectfully submitted that the judgment of the court below should be reversed.

JAMES M. BECK,
Solicitor General.

ALFRED A. WHEAT,
Special Assistant to the Attorney General.

SEPTEMBER, 1922.

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